

**TENG CHANG KHIM v. BADRUL HISHAM ABDULLAH & ANOR  
AND ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA

ABDUL WAHAB PATAIL JCA

DAVID WONG DAK WAH JCA

VARGHESE GEORGE JCA

[CIVIL APPEALS NO: B-01-199-2011 & B-01-363-2011]

3 DECEMBER 2014

**CONSTITUTIONAL LAW:** *Legislature – State Assembly – Absence of assemblyman from State Legislative Assembly sittings – Speaker of State Legislative Assembly announced vacancy of assemblyman’s seat in press conference and mass media – Announcement not made during proceedings of State Legislative Assembly – Whether Speaker’s act in declaring vacancy of seat immune from legal action – Selangor State Constitution 1959, arts. 69, 70(1)*

**CIVIL PROCEDURE:** *Default judgment – Setting aside – Speaker of State Legislative Assembly announced vacancy of assemblyman’s seat in press conference and mass media – Announcement not made during proceedings of State Legislative Assembly – High Court held that assemblyman was still State Legislative Assemblyman for his constituency and that there was no vacancy of said seat – Appeal against decision of High Court – Request for adjournment not granted – Whether judge correct in not allowing adjournment requested*

The appellant was a Speaker of the 12th State Legislative Assembly of Selangor while the first respondent was the assemblyman for N46 Port Klang constituency. The first respondent attended the Selangor State Legislative Assembly sittings on 12 July 2010 and 15 July 2010 but did not attend the sittings on 8 November 2010 until 16 November 2010. The non-attendance was communicated to the appellant *via* a letter. Even though there were no sittings between 15 July 2010 and 16 November 2010, the appellant rejected the first respondent’s reasons for absence and decided that the latter’s absence was without leave. Since the first respondent was absent for six months from sittings, on 19 February 2011, the appellant declared the first respondent’s seat vacant, as provided under art. 69 of the Selangor State Constitution 1959 (‘SSC’), through press statements and the mass media. The appellant’s decision was not made or pronounced during the proceedings of the Selangor State Legislative Assembly. On 21 January, the appellant notified the second respondent that the N46 Port Klang seat was vacant. According to the first respondent, he came to know of the declaration and notification through press reports. The High Court allowed the respondent’s application *vide* encl. 1 which, *inter alia*, declared that (i) the first respondent was still the State Legislative Assemblyman for N46 Port Klang; (ii) there was no vacancy of the said seat; and (iii) that the decision of the appellant declaring the said seat as vacant was *ultra vires* art. 69 of the SSC and/or was wrongful

- A and/or null and void. Hence, the two present appeals. The first appeal was against the decision of the High Court in allowing encl. 1 ('the merit appeal') while the second appeal was against the decision of the High Court in dismissing the appellant's application to set aside the order made in the merit appeal on the ground that it was a judgment in default. The matter was fixed for hearing on 17 February 2011 but the appellant sought an adjournment of the hearing. Case management was fixed on 16 February 2011 for the purpose of fixing a hearing date. The court then fixed the matter for hearing on 18 February 2011 and on the said date, a junior counsel appeared on behalf of the appellant and requested for an adjournment of hearing. The court refused to grant adjournment and after proceeding with the hearing of the parties, the court allowed encl. 1. The appellant filed an application in the High Court to set aside the default judgment of 18 February 2011 but the application was dismissed with costs. The issues that arose were (i) whether the judge was correct in not allowing an adjournment requested by the junior counsel at the hearing of encl. 1; and (ii) whether the appellant's act in declaring the vacancy of the seat for the N46 Port Klang Constituency was immune from legal action.

**Held (dismissing appeals)**

**Per David Wong Dak Wah JCA delivering the judgment of the court:**

- E (1) The presence of the junior counsel did not legitimise the hearing. In fact from the commencement of the hearing, the junior counsel had informed the court that she had no instruction to proceed with the hearing and was not in a position to make any submission. However, since the issues that arose in this matter was determined by the High Court by way of affidavits and on undisputed factual matrix, the court was entitled to proceed to consider the merits of the appeal. (para 28)
- F
- G (2) The considerations in which the appellant used to make his decision were not matters connected with the business of the proceedings in the State Assembly. The purported absence of the first respondent in the sittings of the State Assembly is something outside the walls of the State Assembly. Since the announcement was made on 19 January 2011 in a press conference, it did not form part of the proceedings of the State Assembly. (para 43)
- H (3) In a country where the doctrine of supremacy of Parliament does not apply, the powers of Parliament and State Legislature are subject to the province of the Federal Constitution and what is within its power or not, when there is a challenge to its decision, it is for the courts to decide (*YAB Dato' Dr Zambry Abdul Kadir & Ors v. YB Sivakumar Varatharaj; Attorney General Malaysia (Intervener)*; refd). (para 44)
- I (4) Article 69 of the SSC is silent as to when the six months period is supposed to commence. The calculation of the six months period is to commence from the first day of absence without leave and not from the

last sitting which a State assemblyman was present. This view is fortified with the existence of art. 70(1) of the SSC which provides that there cannot be more than a six-month period between sittings of the State Assembly. Accordingly, the commencement of the six month period should be on either 8 November 2010 or 16 November 2010. (para 50)

***Bahasa Malaysia Translation Of Headnotes***

Perayu merupakan Pengerusi Dewan Undangan Negeri Selangor ke-12 manakala responden pertama adalah Ahli Dewan Undangan Negeri ('ADUN') bagi N46 Bahagian Pelabuhan Klang. Responden pertama menghadiri persidangan Dewan Undangan Negeri pada 12 Julai 2010 dan 15 Julai 2010 tetapi tidak menghadiri persidangan pada 8 November 2010 hingga 16 November 2010. Ketidakhadirannya dimaklumkan kepada perayu melalui sepucuk surat. Walaupun tidak terdapat persidangan antara 15 Julai 2010 dan 16 November 2010, perayu menolak alasan-alasan responden pertama atas ketiadaannya dan memutuskan bahawa ketiadaannya adalah tanpa kebenaran. Oleh kerana responden pertama tiada dalam persidangan selama enam bulan, pada 19 Februari 2011, perayu mengisytiharkan kerusi responden sebagai kosong, seperti yang diperuntukkan di bawah per. 69 Perlembagaan Negeri Selangor 1959 ('PNS'), melalui kenyataan-kenyataan akhbar dan media massa. Keputusan perayu tidak dibuat atau diisytiharkan ketika prosiding Dewan Undangan Negeri Selangor. Pada 21 Januari, perayu memaklumkan kepada responden kedua bahawa kerusi N46 Pelabuhan Klang adalah kosong. Menurut responden pertama, dia mendapat tahu mengenai pengisytiharan dan makluman tersebut melalui laporan-laporan akhbar. Mahkamah Tinggi membenarkan permohonan responden melalui lampiran 1 yang, antara lain, mengisytiharkan bahawa (i) responden pertama masih ADUN bagi N46 Pelabuhan Klang, (ii) bahawa tiada kekosongan kerusi tersebut; dan (iii) bahawa keputusan perayu mengisytiharkan bahawa kerusi tersebut adalah kosong, adalah *ultra vires* per. 69 PNS dan/atau salah dan/atau batal dan tidak sah. Oleh itu, kedua-dua rayuan ini. Rayuan pertama adalah terhadap keputusan Mahkamah Tinggi dalam membenarkan lampiran 1 ('rayuan merit') manakala rayuan kedua adalah terhadap keputusan Mahkamah Tinggi dalam menolak permohonan perayu untuk mengeneipkan perintah yang dibuat dalam rayuan merit atas alasan bahawa ia adalah penghakiman ingkar. Perkara tersebut ditetapkan untuk bicara pada 17 Februari 2011 tetapi perayu memohon penangguhan bicara. Pengurusan kes ditetapkan pada 16 Februari 2011 bagi tujuan menetapkan tarikh bicara. Mahkamah kemudiannya menetapkan perbicaraan perkara tersebut pada 18 Februari 2011 dan pada tarikh tersebut, seorang peguam junior hadir bagi pihak perayu dan memohon bagi penangguhan perbicaraan. Mahkamah enggan membenarkan penangguhan dan selepas meneruskan dengan mendengar kedua-dua pihak, mahkamah membenarkan lampiran 1. Perayu memfailkan permohonan di Mahkamah Tinggi untuk mengeneipkan penghakiman ingkar pada 18 Februari 2011 tetapi permohonan tersebut ditolak dengan kos. Isu-isu yang timbul dalam rayuan-rayuan ini adalah

A

B

C

D

E

F

G

H

I

- A (i) sama ada hakim betul dalam tidak membenarkan penangguhan yang dipohon oleh peguam junior semasa perbicaraan lampiran 1; dan (ii) sama ada tindakan perayu dalam mengisytiharkan kekosongan kerusi N46 Bahagian Pelabuhan Klang dilindungi daripada tindakan undang-undang.

**Diputuskan (menolak rayuan-rayuan)**

- B Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

- C (1) Kehadiran peguam junior tidak mengesahkan perbicaraan. Malahan, daripada permulaan perbicaraan, peguam junior telah memaklumkan mahkamah bahawa dia tidak menerima sebarang arahan untuk meneruskan dengan perbicaraan dan tidak berada dalam apa jua kedudukan untuk membuat hujahan. Walau bagaimanapun, oleh kerana isu-isu yang timbul dalam perkara ini diputuskan oleh Mahkamah Tinggi melalui afidavit dan berdasarkan asas fakta, mahkamah berhak untuk meneruskan untuk mempertimbangkan merit-merit rayuan.
- D (2) Pertimbangan-pertimbangan yang diambil pakai oleh perayu untuk mencapai keputusan bukanlah perkara yang berkaitan dengan hal perkara prosiding dalam Dewan Negeri. Dakwaan ketiadaan responden pertama dalam persidangan-persidangan Dewan Negeri adalah sesuatu yang berada di luar Dewan Negeri. Oleh kerana makluman dibuat pada 19 Januari 2011 dalam sidang akhbar, ia tidak membentuk sebahagian daripada prosiding Dewan Negeri.
- E (3) Dalam sebuah negara di mana doktrin keagungan Parlimen tidak terpakai, kuasa-kuasa Parlimen dan Badan Perundangan Negeri tertakluk kepada bidang kuasa Perlembagaan Persekutuan dan apa yang berada dalam kuasanya atau tidak, apabila terdapat cabaran pada keputusannya, adalah terpulang kepada Mahkamah untuk memutuskannya (*YAB Dato' Dr Zambry Abdul Kadir & Ors v. YB Sivakumar Varatharaj; Attorney General Malaysia (Intervener)*; dirujuk).
- F (4) Artikel 69 PNS tidak memperuntukkan mengenai bila tempoh enam bulan tersebut akan bermula. Perkiraan tempoh enam bulan tersebut harus bermula dari hari pertama ketiadaan tanpa kebenaran dan bukan dari persidangan terakhir dalam mana seorang ADUN hadir. Pandangan ini diperkuatkan lagi dengan per. 70(1) PNS yang memperuntukkan bahawa tidak boleh ada lebih daripada tempoh enam bulan antara persidangan-persidangan Dewan Negeri. Sewajarnya, permulaan enam bulan tersebut haruslah jatuh sama ada pada 8 November 2010 atau 16 November 2010.
- G
- H

**Case(s) referred to:**

- I *Federal Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers* [1983] 1 CLJ 67; [1983] CLJ (Rep) 150 FC (*refd*)  
*Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673 FC (*refd*)  
*YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253 FC (*refd*)

**Legislation referred to:**

Courts of Judicature Act 1964, s. 69(1)

Federal Constitution, art. 72

Selangor State Constitution, arts. 69, 70(1), 75

*For the appellant - Ganesan Nethi Ganuntarajah (Rahayu Mumazaini with him);  
M/s Tommy Thomas*

*For the 1st respondent - Firoz Hussein Ahmad Jamaluddin (Cheng Mai, Muhammad  
Asmirul Asraf Fadli & Nazeera Hanifa with him); M/s Hafarizam Wan & Aisha  
Mubarak*

*For the 2nd respondent - Munahyza Mustafa (Andi Razalijaya A Dadi with her); AG's  
Chambers*

*[Appeal from High Court, Shah Alam; Originating Summons No: 24-197-2011]*

*Reported by Najib Tamby*

**JUDGMENT**

**David Wong Dak Wah JCA:**

**Introduction**

[1] There are two appeals before us. One is Appeal No. B-01-199-2011 (Merit Appeal) which is an appeal against the decision of Shah Alam High Court given on 18 February 2011 allowing encl. 1, the terms of which are as follows:

(a) Allowed the originating summons dated 24 January 2011 ("OS") with costs and granted the following declarations to the first respondent:

(i) That the first respondent is still the State Legislative Assemblyman for N46 Port Klang;

(ii) That there is no vacancy of the said seat of the State Legislative Assembly for constituency known as N46 Port Klang;

(iii) That the decision of the appellant declaring the N46 Port Klang seat as vacant was *ultra vires* art. 69 of the Selangor State Constitution, and/or was wrongful and/or null and void; and

(b) Dismissed the appellant's summons in chambers dated 10 February 2011 which was the appellant's application to strike out the OS on the basis that the matter was not justiciable and that he is conferred immunity under art. 72 of the Federal Constitution and paras. 2 and 3 to the Schedule to art. 77 of the Selangor State Constitution 1959.

[2] The other appeal is Appeal No. B-01-363-2011 ("setting aside appeal") which is an appeal against the decision of Shah Alam High Court given on 4 May 2011 dismissing with costs the appellant's application to set aside the order made in the Merit Appeal dated 18 February 2011 on the ground *inter alia* that it was a judgment in default.

A [3] We heard both the appeals together and reserved judgment to a date to be fixed. We have since considered the respective submissions and now give our decision and grounds for the same.

[4] In view of the nature of the setting aside appeal, we find it fit that we should deal with that appeal first.

B

**Setting Aside Appeal**

*Background Facts*

C [5] To recap, the appellant had filed an application to set aside the judgment of 18 February 2011 on the ground that the same was a judgment in default. The circumstances in which the appellant premised this application were these.

[6] The matter was originally fixed for hearing on 17 February 2011 for encl. 1 (originating summons) and encl. 8 (striking out application).

D

[7] The appellant's solicitors wrote to the court on 11 February 2011 seeking an adjournment of the hearing on 17 February 2011 on the basis that the appellant's counsel, Mr Tommy Thomas was engaged in a trial in Johor Bahru.

E

[8] Case management of the originating summons was then fixed on 16 February 2011 for the purpose of fixing a hearing date. On that day, after consultation with all parties, the court fixed the matter for hearing on 18 February 2011 at 3pm with directions to counsels to file their outline written submissions and bring them to court on the day of hearing.

F

[9] No written request for adjournment was made by counsel for the appellant on 18 February 2011. Nor did they inform the first respondent's solicitors that they intend to apply for an adjournment on 18 February 2011 on the ground that Mr Tommy Thomas would still be in Johor Bahru High Court.

G

[10] At the hearing on 18 February 2011 at 3pm, Mr Tommy Thomas's junior counsel appeared and requested for an adjournment of the hearing on the ground that Mr Tommy Thomas was still conducting a trial in Johor Bahru High Court.

H

[11] After seeking all the parties' views on this application, particularly with regard to the manner in which the hearing date had been fixed during case management on 16 February 2011 in the presence of all parties, the learned judge refused to grant an adjournment and proceeded with the hearing of the matter.

I

[12] The junior counsel did not make any submissions and also did not provide the court with any outline submissions. Submissions by respective counsels for the first and second respondents were made and they also relied on their respective outline submissions.

[13] After hearing parties, the court on the same day dismissed the appellant's encl. 8 (striking out application) and allowed the first respondent's prayers (a), (b) and (c) of the encl. 1 (originating summons) with costs of RM40,000. A

[14] The appellant filed the application in the High Court to set aside the purported "default" judgment of 18 February 2011 which was dismissed with costs. B

#### Our Decision And Reasons

[15] In respect of this appeal there is only one issue and that is whether the learned judge was correct in not allowing an adjournment requested by junior counsel at the hearing of encl. 1. C

[16] Before us as in the High Court, learned counsel for the appellant submits that the judgment obtained on 18 February 2011 was a judgment in default as opposed to a judgment on merits given after hearing submissions from counsel. D

[17] If it was the latter, the law is clear and it is as stated in the Federal Court in *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673:

[44] We conclude by saying that once a regularly obtained order or judgment has been perfected, the court is *functus officio*. The matter as decided *vide* encl. 6 is thus *res judicata* and cannot be re-litigated. It needs to be emphasised that the order made under encl. 6 was appealed and affirmed right up to the Federal Court. It cannot now be revisited or reasserted under any guise in a subsequent proceeding. The issues raised by the respondent in encl. 29 could have been brought up during the appeal process. The law does not allow the respondent to have a second bite of the cherry and in the manner as it did. This passage from *Tenaga Berhad* explains the rationale. E F

There was no merit in the appellant's argument that the second application to set aside the default judgment was justified because it was based upon a different ground from that relied upon in the first application. The doctrine of *res judicata* in its wider sense was applicable in the present case. It was certainly open to the appellant to ground its first application on the basis that the default judgment was irregular. It was therefore an issue which properly belonged to the first application. But it chose not to rely upon that ground. Once the first application was dismissed, it was not open to the appellant to make a second application to set aside the judgment on a different ground. It would amount to presenting one's case in instalment which the law does not permit. G H

In our judgment too, the re-litigation of a regularly and properly concluded matter as determined by the court is prohibited by the wide doctrine of *res judicata*. The judicial process rests on the twin pillars of certainty and finality. A final order or a judgment must therefore be vigorously protected by this doctrine, a position taken by the common law courts ever since *Henderson* [1843]. I

A [18] Learned counsel for the appellant concedes the just stated position, hence his insistence that the circumstances in which the judgment dated 18 February 2011 was given render it a default judgment which would allow the appellant to make an application to set aside as he had done in this case.

B [19] The learned judge in her grounds examined the circumstances and this is what she said:

C Be that as it may, I must make it clear that I already agreed to the postponement requested by counsel for the 1st Defendant and instructed the Registrar to fix a date acceptable to all parties. I was ready to hear the case on the 18th February 2011 after being told by the Registrar that all parties had agreed that it be heard on that day. Even before I proceeded on that very day, I listened to the explanation and arguments by all parties as to the fixing of the date and was satisfied that the date had been acceptable by everybody before the Registrar. There was no issue that the 1st Defendant's counsel was being compelled to accept the date then. There was no letter from the 1st Defendant's counsel to that effect. I noted that Cik Nur Ashikin was not present before the Registrar and Encik Ganesan was not before me on the 18th.

D When Cik Nur Ashikin asked to withdraw from the proceedings, I asked whether the firm of Tommy Thomas is withdrawing and she said that there was no application to discharge. Cik Nur Ashikin then remained throughout the proceedings and I asked her every time the Plaintiff's counsel completed his oral submission whether she wished to say anything each time her answer was she had no instruction ...

E I must stress in this instance, the 1st Defendant was represented by the firm of Tommy Thomas. Although the senior counsel of choice was not there, the junior counsel was present throughout the proceedings. She was given every opportunity to reply and to submit. In fact the Registrar had already informed the parties to prepare for submissions on that day but the 1st Defendant's counsel failed to do so. So the 1st Defendant and his counsel have only themselves to blame for the consequence.

F [20] Learned counsel for the appellant premised his submission on the basic right of every litigant to be heard which he alleges that the appellant was not given. It is also submitted that the appellant was also denied a lawyer of his choice and no submission on behalf of the appellant was made to the learned judge on 18 February 2011.

G [21] Having heard submissions and perused the various affidavits, we are of the view that the crucial event for us to consider is what actually happened during case management on 16 February 2011 before the Deputy Registrar.

H [22] According to Mr Ganesan a/l Nethiganantarajah this is what happened:

I 19. The Deputy Registrar then informed me that she had to fix the hearing on either Friday, 18-2-2011 or Monday, 21-2-2011. As Hafarizam was engaged in a hearing at the Federal Court on Monday, 21-2-2011, the only remaining date was Friday, 18-2-2011.

The Deputy Registrar then directed that the case management be stood down to enable me to contact Mr Thomas on the telephone to check with him on having the Hearing at 3.00 pm on Friday, 18-2-2011.

A

20. I then tried to telephone Mr Thomas, but was unsuccessful.

21. Upon attending again before the Deputy Registrar, I informed her that my attempts to contact Mr Thomas had proved unsuccessful.

B

22. The Deputy Registrar informed parties that she had to fix the Hearing on Friday, 18-2-2011 at 3.00 pm. The Deputy Registrar also informed me that no further adjournments of the Hearing would be allowed.

C

23. I informed the Deputy Registrar that if she insisted on fixing the Hearing at 3.00 pm on Friday, 18-2-2011, I could only record this date and inform Mr Thomas accordingly, as I was not involved in this matter in any capacity, and was only attending Case Management that day as Mr Thomas was engaged in Johor Bahru Trial. I also informed the Deputy Registrar that as I was not one of the counsel with conduct of this matter, I could not agree to 'no further adjournments'.

D

24. The Deputy Registrar then fixed the Hearing at 3.00 pm on 18-2-2011 before Justice Dato' Zaleha binti Yusof at Shah Alam High Court. I duly recorded this date, and the Case Management then ended.

E

**[23]** Mr Mohd Hafarizam bin Harun counsel for the first respondent recollect the event as follows:

6. I was present during case management on 16-2-2011 before the Deputy Registrar. Paragraphs 7-9 of the affidavit 2 are admitted. In addition to the averment in paragraph 14 of affidavit 2, the Deputy Registrar also directed parties to file outline written submissions and bring it on the day fixed for hearing.

F

7. In reply to paragraphs 21, 22, and 23 of affidavit 2, I aver that after the stand down, Mr Ganesan a/l Nethiganantarajah informed the Court that he had been unable to contact Mr Thomas and therefore, will leave it to the Court and take whatever date the Court fixes and will inform Mr Thomas accordingly.

G

8. Paragraph 24 of the affidavit 2 is admitted. Now produced and shown to me is a copy of the Court's minutes of the case management on 16-2-2011, marked as exhibit "MHH-1".

H

9. Therefore, on 18-2-2011 hearing date was fixed with the consent of all parties and it is not open now for Ganesan to contend otherwise. The 1st Defendant's solicitors did not at any time after the case management on the morning of 16-2-2011 or to inform the Court that their counsel intends to seek an adjournment on the hearing of 18-2-2011 itself.

I

A [24] The crucial question which one needs to ask is “was the date of  
18 February 2011 fixed with the consent of counsel”. It is common ground  
that Mr Tommy Thomas was not free on that date. It is common ground that  
Mr Ganesan could not contact Mr Tommy Thomas during the short  
adjournment. Under such circumstance, can we say that the date was agreed  
B by counsel? It is our considered view that it is unlikely that Mr Ganesan had  
consented to the date unreservedly when in the first place he had informed  
that the date of 18 February 2011 was not suitable to Mr Tommy Thomas  
and had asked for another date. It is unfortunate that the Deputy Registrar  
had not recorded the minutes of the case management accurately and that is  
C to reflect that Mr Tommy Thomas could not be contacted during that short  
adjournment and as such Mr Ganesan was not able to obtain any instruction  
from Mr Tommy Thomas.

[25] Had the learned judge been fully apprised of that vital fact, she may  
have taken a different view. The right of litigant to engage counsel of his  
choice should not be taken lightly. The Federal Court in the case of *Federal*  
D *Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers* [1983]  
1 CLJ 67; [1983] CLJ (Rep) 150; [1983] 1 MLJ 175 per Abdooldader J noted  
that the refusal of the Industrial Court to allow the litigant’s choice of counsel  
“was a gross violation of the fundamental principles of natural justice”.  
E However such counsel of choice must ensure that he does not abuse his right  
by not attending a hearing date when he had agreed to it.

[26] We are fully aware that nowadays application for adjournment by  
litigants cannot be taken for granted and it will only be granted only in  
exceptional circumstances. That said, we must not lose sight of the  
F paramount duty of the courts and that is to ensure that justice is done in all  
cases.

[27] In the present case, the hearing was heard without the benefit of full  
submission from Mr Tommy Thomas bearing in mind that it related to an  
interpretation of the Constitution of the Selangor in the context of the power  
G of the Speaker of the Legislative Assembly in declaring a state seat vacant  
and the Federal Constitution. Needless to say it was very much a public  
interest matter. Under such circumstances, we ask the question whether  
justice would not have been better served if the learned judge after hearing  
counsel for the first respondent were to at least adjourn to another short date  
H so that Mr Tommy Thomas be given a chance to reply what had been  
submitted by respective counsel for the first respondent. We see no prejudice  
to either party if that course of action was taken. The presence of junior  
counsel with respect does not legitimise the hearing. In fact from the  
commencement of the hearing the junior counsel had informed that she had  
I no instruction to proceed with the hearing and not in any position to make  
any submission.

**Conclusion**

[28] Ordinarily, a conclusion as aforesaid would entail this court to set aside the orders of the court made on 18 February 2011 and to remit the matter for retrial on its merits. However, as the issues that arose in this matter was determined by the High Court by way of affidavits and on undisputed factual matrix, this court was entitled to proceed to consider the merits of the appeal. Appeals such as this are disposed by way of a rehearing of the arguments and accordingly there will not be any prejudice caused thereby to the parties. In fact s. 69(1) of the Courts of Judicature Act 1964 (Revised - 1972) states as follows:

- (1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

With that we now consider the merit appeal.

**Merit Appeal***Background Facts*

[29] The appellant was the speaker of the 12th State Legislative Assembly of Selangor while the respondent was the assemblyman for N46 Port Klang constituency.

[30] The appellant is empowered under art. 69 of the Selangor State Constitution vested to declare assembly seats vacant if the relevant state assemblyman is found to be absent for a period of six months.

[31] The appellant found that the respondent had been absent for six months from sittings of the State Assembly and on 19 February 2011 declared the seat of the respondent vacant as allowed under art. 69 of the Selangor State Constitution.

[32] The factual matrix upon which the appellant exercised his power is undisputed and they were as set out in the submissions of respective counsels and for convenience we adopt the same with some relevant amendments.

[33] The first respondent attended the Selangor State Legislative Assembly sittings on 12 July 2010 and 15 July 2010. The first respondent did not attend the sittings on 8 November 2010 till 16 November 2010 as he was seeking traditional medical treatment. There were no sittings between 15 July 2010 and 8 November 2010. The first respondent informed the appellant *via* a letter that he was unable to attend the sittings from 8 November 2010 to 16 November 2010 as he was seeking traditional medical treatment.

A [34] The appellant, in a letter dated 21 December 2010, rejected the first respondent's reasons for absence and decided that the respondent's absence was without leave.

B [35] On or around 19 January 2011, the appellant through press statements and the mass media, declared the first respondent's seat of Selangor State Legislative Assembly N46 Port Klang vacant, purportedly pursuant to art. 69 of the Selangor State Constitution.

[36] The first respondent came to know of the appellant's decision through press reports.

C [37] The appellant then on 21 January 2011 notified the second respondent, the election commission, that the N46 Port Klang seat was vacant. Again the first respondent came to know of this fact through press reports. That letter dated 21 January 2011 to the second respondent came to the first respondent's sight when reading the affidavit in reply of the second respondent affirmed on 7 February 2011.

D [38] Subsequently, the first respondent first saw a copy of the purported "declaration" by the speaker when reading the affidavit in reply of the second respondent affirmed on 7 February 2011.

E [39] The decision of the appellant was not made or pronounced during the proceedings of the Selangor State Legislative Assembly.

#### **Our Decision And Reasons**

[40] In respect of this appeal we are in no doubt that there are only two issues which are as follows:

- F
1. Whether the Appellant's act in declaring the seat for the N46 Port Klang constituency is immune from legal action?
  2. If the answer to the issue 1 is in the negative, was the aforesaid action of the Appellant correct in law?

G [41] For issue 1, it concerns the interpretation of art. 72 of the Federal Constitution which reads as follows:

- H
- (1) The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any court.
  - (2) No person shall be liable to any proceedings in any court in respect of anything said or any vote given by him when taking part in proceedings of the Legislative Assembly of any State or of any committee thereof.
  - (3) No person shall be liable to any proceedings in any court in respect of anything published by or under the authority of the Legislative Assembly of any State.
- I

(4) Clause (2) shall not apply to any person charged with an offence under the law passed by Parliament under Clause (4) of Article 10 or with an offence under the Sedition Act 1948 as amended by the Emergency (Essential Powers) Ordinance No. 45, 1970. A

(5) Notwithstanding Clause (4), no person shall be liable to any proceedings in any court in respect of anything said by him of the Ruler of any State when taking part in any proceedings of the Legislative Assembly of any State or any committee thereof except where he advocates the abolition of the Ruler's position as the constitutional Ruler of that State. B

[42] Learned counsel for the appellant also relies on art. 75 of the Selangor State Constitution which reads as follows: C

Procedure of Legislative Assembly:

75(1) Subject to the provisions of the Federal Constitution and this Constitution, the Legislative Assembly shall regulate its own procedure and may from time to time make, amend and revoke Standing Rules and Orders for the regulation and orderly conduct of its proceedings and conduct of business. D

[43] Premised on the above articles, learned counsel for the appellant submits that the appellant's action in declaring the seat of N46 Port Klang constituency vacant is not subject to judicial scrutiny. With respect, we are unable to agree and our reasons are these. It should be noted that in both articles they provide that only decisions made during proceedings in the State Assembly are not subject to judicial scrutiny. Can we then say that the decision of the appellant in making the declaration of vacancy a decision made during proceedings in the business of the State Assembly. We answer in the negative. The considerations in which the appellant used to make his decision were not matters connected with the business of the proceedings in the State Assembly. The purported absence of the first respondent in sittings of the State Assembly is something outside the walls of the State Assembly. Further, we agree with the learned judge that since the announcement was made on 19 January 2011 in a press conference, it did not form part of the proceedings of the State Assembly. E F G

[44] In any event whether immunity can be extended to the Speaker of a State Assembly is settled by the Federal Court in the case of *YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253 where the Federal Court held that in a country where the doctrine of supremacy of Parliament does not apply, the powers of Parliament and State Legislature are subject to province of the Federal Constitution and what is within its power or not, when there is a challenge to its decision, it is for the courts to decide. With that we move on to issue 2. H I

A **[45]** Learned counsel for the appellant submits that the appellant's interpretation of art. 69 of the Selangor State Constitution is correct. Article 69 reads as follows:

If a member of the Legislative Assembly is without leave of the Speaker absent from every sitting thereof for a period of six months his seat shall

B be declared vacant by the Speaker

**[46]** The crucial issue is whether the first respondent had been absent from every sitting for a period of six months. Of relevance to this issue is art. 70(1) of the Selangor State Constitution which reads as follows:

C His Highness shall from time to time by Proclamation published in the Gazette summon the Legislative Assembly and shall not allow six months to elapse between the last sitting in one session and the date appointed for its first sitting in the next session.

D **[47]** The salient facts here to recap are as follows. The first sitting of the State Assembly for 2010 was from 12 to 14 April 2010. In respect of the second sitting the first respondent was absent on 13 and 14 July 2010 but for medical reasons. He was however present on 15 July 2010. From 15 July 2010 till 8 November 2010 there was no sitting. The third sitting commenced from 8 to 12 November and 15 November 2010 which the first respondent was absent. The appellant then calculated the six months absence from 16 July 2010 till 16 January 2011 and premised on that the appellant concluded that the first respondent had been absent for a period of six months which permitted him to exercise the power provided for in art. 69 of the Selangor State Constitution to declare the seat vacant which he did on 19 January 2011.

F **[48]** The learned judge rejected the aforesaid submission in the following manner:

17. Hence, it is my considered opinion that the Court must be reasonable and practical in interpreting the said provision of Article 69 of the SC. I therefore feel every sitting must refer to the first time he is absent in the sitting and there must be a sitting of the State Assembly. For the year of 2010, the duration of the meeting of the State Assembly are as follows:

G

First meeting - 12th to 14th April 2010

H

Second meeting - 12th to 15th July 2010

Third meeting - 8th to 12th and 15th November 2010.

18. The Plaintiff was absent at sittings on 13th and 14th of July 2010. He produced a medical certificate for his absence. However he was present on 15th July 2010.

I

19. From the Schedule of the meeting it is clear that there was no sitting from 16.7.2010. The Plaintiff was absent for the whole duration of the 3rd meeting. The 1st defendant had calculated the Plaintiff's absence to begin from 16.7.2010 and therefore the period

of 6 months completed on 16.1.2011. According to the declaration shown in exhibit TCK-4, his seat was declared vacant effective from 16.1.2011. As I have stated earlier, there must be a sitting of the State Assembly for a person to be absent from it. As had been decided in *Sivakumar's* case (*supra*) "sitting" and "proceeding" are the same. There is no proceeding if there is no sitting. So how could we calculate the Plaintiff's absence "from every sitting" to start from the period when there is no sitting? Common sense would tell that "absence from every sitting" must begin from the period where there is a sitting.

[49] Article 69, is silent as to when the six months period is supposed to commence. Be that as it may, we are constrained to give art. 69 an interpretation which does not completely ignore the clear intention of giving the power to the Speaker to declare a seat vacant and leads to absurdity.

[50] Approaching the task in those manners, we are attracted by the contention of the first respondent's counsel which is that the calculation of the six months period is to commence from the first day of absence without leave and not from the last sitting which a State Assemblyman was present. With such interpretation the periods in which there are no sittings would not be taken into account in the calculation of the six months period. Our view is fortified with the existence of which art. 70(1) of the Selangor State Constitution provides that there cannot be more than a six months period between sittings of the State Assembly. Accordingly the commencement of the six months period should be either 8 November 2010 (the first day of the sitting when first respondent was absent without leave of absence) or 16 November 2010 (the last day of the sittings for November 2010).

[51] Accordingly we affirm the decision of the learned judge and dismiss the appeal with no order as to costs. We also order the deposit to be refunded.

A

B

C

D

E

F

G

H

I